2013 IL App (1st) 113454-U

FIRST DIVISION
FILED: September 3, 2013

No. 1-11-3454

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 2881
	)	
DARRELL WIMBERLY,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 Held: The circuit court did not err in dismissing the defendant's postconviction petition at the first stage of postconviction proceedings.

¶ 2 The defendant, Darrell Wimberly, appeals from the circuit court's order dismissing his petition filed pursuant to the Post Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (2010)). On appeal, he argues that the circuit court erred in dismissing his claim at the first stage of proceedings under the Act, because he stated the gist of a constitutional claim that he was given an excessive sentence. For the reasons that follow, we affirm the circuit court's judgment.

¶ 3 The evidence at the defendant's jury trial showed that, in 2006, the defendant approached two victims while holding a gun, ordered them to the ground, took valuables from them, took a few steps away, and then turned and shot one of the victims in the back before fleeing. In April 2009, after the jury returned a verdict finding the defendant guilty of attempted first degree murder and two counts

of armed robbery, the trial court sentenced him to consecutive terms of 50, 15, and 15 years' imprisonment for the three crimes. We affirmed his conviction and sentences on direct appeal. See People v. Wimberly, No. 1-09-1328 (2011) (unpublished order pursuant to Supreme Court Rule 23).

¶ 4 In July 2011, the defendant filed a pro se postconviction petition arguing, among other things, that his trial and appellate counsel were ineffective for failing to challenge the imposition of consecutive sentences against him. In September 2011, the circuit court dismissed the defendant's petition as frivolous and patently without merit. The defendant now timely appeals.

¶ 5 The Act provides a means by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. People v. Pendleton, 223 Ill. 2d 458, 471, 861 N.E.2d 999 (2006). Except in cases where the death penalty has been imposed, proceedings under the Act are divided into three distinct stages. People v. Gaultney, 174 Ill. 2d 410, 418, 675 N.E. 2d 102 (1996). At the first stage, the trial court has 90 days to examine the petition independently and summarily dismiss it if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010); Gaultney, 174 Ill.2d at 418. The petition need present only the gist of a constitutional claim; if it does, summary dismissal is improper. Gaultney, 174 Ill.2d at 418. If not summarily dismissed, the petition proceeds to the second stage, at which an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. 725 ILCS 5/122-4, 122-5 (West 2010); Gaultney, 174 Ill. 2d at 418. A petition that is not dismissed at the first or second stage advances to the third stage, at which an evidentiary hearing is held. 725 ILCS 5/122-6 (West 2010); Gaultney, 174 Ill.2d at 418. Here, the defendant's petition was dismissed at the first stage of postconviction proceedings. We review de novo a first-stage dismissal of a postconviction petition. People v. Morris, 236 Ill. 2d 345, 354, 925 N.E.2d 1069 (2010).

¶ 6 The defendant argues that his petition stated the gist of a constitutional claim, because it argued that the consecutive sentences imposed against him were not statutorily authorized and therefore must be modified to run concurrently. Although the State argues that the defendant has forfeited this argument for failing to raise it in earlier proceedings, the defendant correctly notes in

his brief that "a sentence not authorized by statute is void." People v. Johnson, 2011 IL App (1st) 092817, ¶ 89. "[A] void order may be attacked at any time or in any court, either directly or collaterally" (People v. Thompson, 209 Ill. 2d 19, 25, 805 N.E.2d 1200 (2004)), and "a challenge to a void order is not subject to forfeiture" (People v. Marshall, 242 Ill. 2d 285, 302, 950 N.E.2d 668 (2011)). Thus, we reject the State's forfeiture argument, and we consider on the merits whether the defendant's consecutive sentences were authorized by statute.

¶ 7 At the time of the defendant's crime, the imposition of consecutive sentences was governed by section 5-8-4(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-4(a) (West 2006)), which provided, in pertinent part, that a court "shall impose consecutive sentences if," among other things, "one of the offenses for which the defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury." (The Code contained the same provision at the time of the defendant's sentencing, but the quoted section has now been relocated to subsection (d) (see 730 ILCS 5/5-8-4(d) (West 2010)). The defendant agrees that each of his convictions are for Class X felonies. See 720 ILCS 5/8-4(c)(1)(D) (West 2006) (attempt murder); 720 ILCS 5/18-2(b) (West 2006) (armed robbery). He also expressly concedes that he inflicted severe bodily harm during the course of the attempt murder, by shooting one of the victims. Thus, he agrees that the attempt murder conviction triggers a consecutive sentence pursuant to section 5-8-4(a) of the Code, and he concedes that his attempt murder sentence should run consecutively to his armed robbery sentences. Instead, he notes that section 5-8-4(a) does not mandate consecutive sentences for all convictions stemming from a single course of conduct that includes one triggering offense, but instead requires consecutive sentences only for the specific triggering offenses the section describes. See People v. Curry, 178 Ill. 2d 509, 538-39, 687 N.E.2d 877 (1997). That is, in cases where the triggering offense is not first degree murder, section 5-8-4(a) authorizes consecutive sentences only where each of the sentences that would run consecutively to the others involved severe bodily injury. See People v. Whitney, 188 Ill. 2d 91, 100, 720 N.E.2d 225 (1999) (holding that sentences for aggravated murder of one victim and aggravated discharge of a firearm

towards another victim could not run consecutively under section 5-8-4(a), because the second conviction did not result in severe bodily harm). Based on these rules, the defendant argues that his only triggering offense was attempt murder accompanied by severe bodily injury. His armed robbery convictions, the argument continues, did not involve severe bodily harm, and, therefore, those convictions do not trigger consecutive sentences under section 5-8-4(a). Thus, he asserts, the consecutive sentences for those two convictions are not statutorily authorized and must be declared void.

¶ 8 We agree with the defendant that his armed robbery sentences cannot run consecutively to one another unless one of them constitutes a triggering offense, that is, unless one of them involved serious bodily injury. However, we disagree with the defendant's position that his shooting one victim (and causing severe bodily injury) did not occur during the armed robberies.

¶ 9 Although our supreme court has not articulated a test for determining whether a violent act occurred during the commission of a felony, this court has drawn upon death-sentence jurisprudence for felony murder purposes to hold that the standard "is met where commission of the triggering offense and infliction of the bodily harm, the precise timing of which not being dispositive, occurred 'essentially simultaneously.' " People v. Thompson, 331 Ill. App. 3d 948, 956, 773 N.E.2d 15 (2002) (quoting People v. Sample, 326 Ill. App. 3d 914, 927-28, 761 N.E.2d 1199 (2001)). The flexibility of this standard is illustrated in People v. Thomas, 137 Ill. 2d 500, 561 N.E.2d 57 (1990), a case in which the defendant killed a victim and then left her body in a burning garage with the hope of concealing the murder. On appeal, the defendant argued that he could not have committed the murder during the arson, because the victim was dead at the time he started the fire. Thomas, 137 Ill. 2d at 533. In rejecting the defendant's argument, the supreme court held that, even if the two crimes were conceived separately, they occurred "essentially simultaneously," because they were "part of the same criminal episode." Thomas, 137 Ill. 2d at 533.

¶ 10 The defendant does not challenge this "essentially simultaneously" test, or argue that the application of the standard articulated in Thomas or related cases is unduly expansive. Thus, we do

not consider the matter at length, except to say that the application of this "same criminal episode" standard in consecutive-sentence cases does not violate the general rule that crimes committed in a single course of conduct receive concurrent sentences unless a statutory exception, such as those listed in section 5-8-4(a), applies. As the defendant emphasizes in his brief, in the consecutive-sentences context, in order to render an offense a triggering offense, the associated severe bodily harm must be inflicted on the victim of the offense. See Whitney, 188 Ill. 2d at 99-100. That restriction did not apply in death-penalty-eligibility cases.

¶ 11 Under this test as the supreme court has applied it, there can be little question that the defendant's shooting one victim occurred "essentially simultaneously" to his robbing that victim. Indeed, although the defendant had taken the victim's possessions and started to leave, he nonetheless shot the victim as part of a short encounter that also involved his robbing the same victim. Based on this timing, and on the circumstances of the shooting, it is nearly impossible to view the shooting and the armed robbery as anything other than a single transaction. Thus, in our view, the shooting took place during both the attempt murder and the armed robbery of the victim, so that both offenses triggered consecutive sentences under section 5-8-4(a).

¶ 12 The defendant's reliance on People v. Stanford, 2011 IL App (2d) 090420, does not change our result. In Stanford, the defendant was convicted of three counts of first-degree murder, five counts of aggravated battery with a firearm, and eight counts of armed violence, stemming from an incident in which he and a co-defendant "shot at five young men on a porch *** and injured three of them." Stanford, 2011 IL App (2d) 090420, ¶ 1, 3. One victim, Matthew Pruneda, was shot in the face and both ankles. Stanford, 2011 IL App (2d) 090420, ¶ 3. For sentencing purposes, the trial court found that the injury to Pruneda's right ankle did not constitute a severe bodily injury, but that the injuries to his face and left ankle did constitute such an injury. Stanford, 2011 IL App (2d) 090420, ¶ 13. Thus, the trial court ordered that the sentences relating to the left ankle and face run consecutively, but it ordered the sentence relating to Pruneda's right ankle to run concurrently with those for other non-triggering offenses. Stanford, 2011 IL App (2d) 090420, ¶ 13. From Stanford,

the defendant draws the point that "although Pruneda suffered two severe bodily injuries *** these injuries could not be used to make the armed-violence conviction for shooting Pruneda in the right ankle into a triggering offense." (Emphases in original.) We agree with the defendant that severe bodily injury caused by one crime cannot convert another crime into a triggering offense. However, here, we have concluded that the defendant's armed robbery conviction involved severe bodily injury itself. Thus, it constitutes a triggering offense under the Code.

¶ 13 For the above reasons, we conclude that the defendant's shooting one of the armed robbery victims inflicted the serious bodily injury necessary to make his armed robbery of that victim an offense that triggered mandatory consecutive sentencing pursuant to section 5-8-4(a) of the Code. Accordingly, we conclude that, when it ordered that the defendant's two sentences for armed robbery be served consecutively, the trial court did not exceed its statutory authority. Because the court did not exceed its statutory authority in imposing the defendant's consecutive sentences, those sentences are not void. As a result, we agree with the circuit court that the defendant's postconviction petition did not state the gist of a constitutional claim in the form of an excessive sentence.

¶ 14 The defendant also argues that his trial and appellate counsel provided ineffective assistance by failing to challenge the imposition of consecutive sentences against him. However, in order to succeed on a claim of ineffective assistance of counsel, a defendant must establish both that counsel's performance was substandard and that the substandard performance caused him prejudice. Strickland v. Washington, 466 U.S. 668 (1984); People v. Albanese, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984); People v. Boyd, 363 Ill. App. 3d 1027, 1034 (2006). Because we have held that the defendant's proposed sentencing argument is not meritorious, we necessarily hold any failure to raise it did not prejudice him. Eg., People v. Enis, 194 Ill. 2d 361, 377, 743 N.E.2d 1 (2000).

¶ 15 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 16 Affirmed.